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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MAURICE DANCE, et al.
Petitioners,

v.

S. DAVID AVIEL
Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. May a plaintiff litigate pendent state law tort claims in federal court, despite the bar of the Eleventh Amendment, simply by naming State officials as defendants in their individual capacities?

LIST OF PARTIES

Petitioners: Maurice Dance, Jay Tontz, Wade Morehouse, Bruce MacNab and Richard Zock.

Respondent: S. David Aviel.

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OPINIONS BELOW

The relevant decision of the United States Court of Appeals for the Ninth Circuit is set forth at Appendix A-1 to A-7. The relevant decision of the United States District Court is set forth at Appendix A-8 to A-17.

JURISDICTIONAL GROUNDS

The unpublished decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on April 14, 1994. This petition for writ of certiorari is due on or before May 14, 1994.

This Court has jurisdiction to review the lower court's decision by writ of certiorari under 28 U.S.C. § 1254(3).

APPLICABLE FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Eleventh Amendment:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

STATEMENT OF THE CASE

1. Nature of this Controversy; Proceedings Below.

This civil rights action for damages under 42 U.S.C. § 1983 was brought by Professor S. David Aviel, ("respondent") who sued the State of California and five administrators ("petitioners") at California State University

at Hayward ("CSUH") for violating his civil rights under 42 U.S.C. § 1983 and for several pendent state law claims.

Respondent claimed that petitioners attempted to discipline him in retaliation for a lawsuit he filed against CSUH in 1989. Petitioners were high-level administrators and respondent's supervisors at the University: Dr. Dance, President of the University; Dr. Jay Tontz, Dean of the Business School; Dr. Wade Morehouse, Associate Dean; and Prof. Richard Zock, Chairman of respondent's department.

The pendent state law claims sought to hold the State and petitioners liable in damages for the alleged retaliation, under several tort law theories - including defamation, invasion of privacy, infliction of emotional distress and breach of contract. When the issue of the Eleventh Amendment immunity of the State was raised, respondent voluntarily dismissed it from the action; but left in, as defendants, the petitioners. The pendent state law claims all alleged that petitioners were acting in the course and scope of their State employment when they allegedly committed the torts. The district court granted summary judgment for petitioners on the section 1983 claims and dismissed the pendent state claims on Eleventh Amendment grounds, petitioners having established that any judgment for damages would directly impact the State's treasury, by virtue of the provisions of Cal. Govt.

Code § 825.[1/] (Memorandum and Order, App. to Pet. Writ of Cert., at A-14 - A-15).

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1. Cal. Gov't Code § 825 provides in relevant part: "If an employee or former employee of [the State] request the [State] to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the [State] and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the [State] shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the [State] has agreed.

   If the [State] conducts the defense of an employee or former employee against any claim or action with his reasonable good faith cooperation, the [State] shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the [State] has agreed; but, where the [State] conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the [State] not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the [State], the [State] is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the [State].

   Nothing in this section authorizes the [State] to pay such part of a claim or judgment as is for punitive or exemplary damages."

On appeal, the Ninth Circuit affirmed the granting of summary judgment on the § 1983 claim, but reversed the dismissal of the pendent state law claims on Eleventh Amendment grounds. The Ninth Circuit, in effect, held that a plaintiff-respondent could avoid the bar of Eleventh Amendment immunity simply by the artifice of naming State officials as defendants in their individual capacities. (Memorandum, App. to Pet. Writ of Cert., at A-5 - A-6). Despite this Court's clear direction to the contrary in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Ninth Circuit held Eleventh Amendment immunity was not applicable (*Id.* at A-5).[2/]

2. Reasons for Granting this Petition.

This decision by the Ninth Circuit extends an erroneous doctrine first announced by it in *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981) and recently reaffirmed by it in *Pena v. Gardner*, 976 F.2d 469 (9th Cir. 1992). In *Pennhurst*, this Court explained the importance of distinguishing between federal and state law claims in evaluating the reach of the Eleventh Amendment immunity, a distinction which is crucial to the system of Federalism: "A federal court's grant of relief against State officials on the basis of state law, whether prospective or

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2. The Ninth Circuit relied upon a dictum of Yale's Professor Tribe in overruling petitioners' claim to Eleventh Amendment immunity as to the pendent State law claims. Memorandum, App. to Pet. Writ of Cert., at A-6, quoting L. Tribe, *American Constitutional Law* 132-33 n. 22 (1978). With all due respect to Professor Tribe, it is *this* Court which says what the Constitution is.

retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on State sovereignty than when a federal court instructs State officials on how to conform their conduct to State law." 465 U.S. at 106.

The error represented by the decision below is not sought to be corrected simply because it is wrong, and representative of a result which conflicts directly with the principles of federalism that underlie the Eleventh Amendment. The interpretation of the Ninth Circuit is not confined to it. At least two other circuits, and some district courts, have adopted this rationale, which is inimical to reasoned limits on Federal jurisdiction. *E.g., Jackson v. Georgia Dept. of Transp.*, 16 F.3d 1573 (11th Cir. 1994); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992); cf. *Huang v. Board of Governors*, 902 F.2d 1134, 1138 (4th Cir. 1990) (*Pennhurst* bars claims for monetary relief based upon violations of state laws).

Given the conflict below in the circuit Courts of Appeal, resolution by the Court is necessary to resolve this important issue, which at its core, concerns the basic structure of Federalism.

Moreover, given the inconsistency of the lower court's ruling with *Pennhurst*, granting of this petition is necessary so that this Court may exercise its supervisory powers to correct the lower courts' failure to heed its mandates. The lower courts should not, under the guise of interpreting this Court's rulings, be allowed to substitute

rules of constitutional law, however academically correct, in place of and contrary to those announced by this Court.

ARGUMENT

I

REVIEW OF THIS CASE IS NEEDED TO PREVENT AN END RUN AROUND THE ELEVENTH AMENDMENT BY THE ARTIFICE OF "INDIVIDUAL CAPACITY" LAWSUITS AGAINST STATE OFFICIALS ON STATE LAW CLAIMS

The doctrine of *Ex parte Young*, 209 U.S. 123 (1908) allows federal court § 1983 claimants to obtain relief for alleged violations of federal constitutional law. Under the *Ex parte Young* doctrine, individual capacity lawsuits against State officials can proceed despite the bar of Eleventh Amendment immunity, under the fiction, necessary to ensure the supremacy of federal law, that the officials' illegal conduct is *ultra vires*. 209 U.S. at 160.

It was undisputed below that the effect of any judgment on respondent's state law tort claims would, by virtue of the provisions of state law, be paid directly out

of the State's treasury.[3] *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recovery of money from the State, the State is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit."); *Pennhurst, supra*, 465 U.S. at 101.

This Court noted that the *ultra vires* doctrine of *Ex parte Young* could not be extended to state law claims merely by the use of clever verbiage:

> "Under the dissent's view of the ultra vires doctrine, the Eleventh Amendment would have force only in the rare case in which a plaintiff foolishly attempts to sue the State in its own name, or where he cannot produce some state statute that has been violated to his asserted injury. Thus, the ultra vires doctrine, a narrow and questionable exception, would swallow the general rule that a suit is against the State if the relief will run against it."

Id. at 116.

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3. The district court stated:

> "Defendants have now shown that any judgment against them will be paid by the State of California pursuant to California Government Code § 825. A judgment against defendants would thus be a judgment against the State of California under the meaning of *Pennhurst*. This Court therefore cannot hear plaintiff's state law claims."

Memorandum and Decision, App. to Pet. Writ of Cert., at A-15.

Here, respondent was not so foolish as to continue his suit against the State directly. And, the lower court held that the Eleventh Amendment would not apply to the pendent state law claims against these officials, despite the direct, unquestioned impact of a judgment on the State treasury. (Memorandum, App. to Pet. Writ of Cert., at A-6). This end run around the Eleventh Amendment cannot be squared with *Pennhurst*, and must be overturned.

II

REVIEW BY CERTIORARI IS NECESSARY TO ENFORCE A UNIFORM RULE OF GREAT NATIONAL IMPORTANCE

The importance of Eleventh Amendment immunity of the States has been repeatedly emphasized by this Court in its decisions, as the very linchpin of our Federal system of government. *Pennhurst*, 465 U.S. at 98: "In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III..."

However, not only in this case, but in other decisions, the Ninth Circuit and other courts of appeal have allowed an "end run" around the Eleventh Amendment, by extending the legal fiction of "individual capacity" lawsuits to state law claims against State officials in federal court damage actions. *Pena v. Gardner*, 976

F.2d 469 (9th Cir. 1992); *Jackson v. Georgia Dept. of Transp.*, 16 F.3d 1573 (11th Cir. 1994); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992).[4/]

The rationale of these circuits courts, in rejecting the States' claim to Eleventh Amendment immunity where their indemnification statutes require the payment of any judgments against their employees, rests upon a faulty premise. The assumption of these decisions is that, if Eleventh Amendment immunity is extended in this circumstance, the plaintiff will be deprived of a remedy. E.g., *Jackson,* 16 F.3d at 7; Memorandum, App. to Pet. Writ of Cert., at A-6.

These decisions overlook the true nature and effect of Eleventh Amendment immunity, which has no effect on the continued viability of a claimant's remedy in state court. *Maine v. Thiboutot,* 448 U.S. 1, 9 n.7 (1980). The sole effect of the Eleventh Amendment is to confine a claimant to a state forum: the claimants remedy remains unimpaired, even if the immunity applies. And, contrary to the suggestion of these federal courts, the State indemnification statutes were not designed as a means for

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4. These decisions conflict with other circuit decisions following *Pennhurst*, e.g. *Huang v. Board of Governors*, 902 F.2d 376, 378 (5th Cir. 1990).

the States to avoid liability for their officials' wrongs, but were enacted to guarantee the payment of such claims, in state court.[5] These statutes also prevent discouragement of public officials' diligent performance of their duties, by protecting them against personal financial losses, while providing the injured claimant with a solvent source for satisfaction of judgment.

It is incongruous, to say the least, that the limited waiver of sovereign immunity by the States represented by these indemnification statutes, is now the lever for a wholesale abrogation of their Eleventh Amendment immunity. Such a result is contrary to the rule, well-established in Eleventh Amendment jurisprudence, that a State's consent to be sued for damages in state court does not waive its immunity from suit in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Montana v. Peretti*, 661 F.2d 756, 758 (9th Cir. 1981).

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5. Van Alstyne, *California Government Tort Liability Practice*, § 5.89, at 593-94 (1980 ed.). The late Prof. Van Alstyne was one of the members of the California Law Revision Commission which drafted the California Tort Claims Act, Cal. Govt. Code § 800 et seq.

The nationwide importance of this issue is a function of the widespread legislation by the several States Code § 825.[6] If the rationale of these decisions of the circuit courts remains uncorrected, the States will be opened wide to federal court litigation, in a result inimical to the purposes of Federalism sought to be protected by the Eleventh Amendment.

Under these circumstances, it appears necessary for the Court to establish and enforce a uniform national rule of Eleventh Amendment immunity by granting the petition in this case, and reversing the decision below.

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6. E.g., Fla. Stat. Ann. § 768.28 (state assumes liability for wrongs of employees within scope of employment and creates insurance trust fund to pay judgments); 5 Ill. Comp. Stats. Ann. 350/2(d) (state provides for indemnity for employees' acts within scope of employment); Mass. Gen. Laws ch. 258, § 9 (indemnification of employees); N. J. Rev. Stat. § 59:10-1 (indemnity); N. Y. Ct. Cl. Act § 20-a (payment of claims against state employees); Ohio Rev. Code Ann. § 2743.02 (state assumes liability for acts and omissions of state employees).

CONCLUSION

For all of the above-stated reasons, the decision of the Ninth Circuit should be reviewed by certiorari, and reversed.

DATED: May 9, 1994.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

S. DAVID AVIEL,	)	**[Filed April 14, 1994]**
	)	
Plaintiff-Appellant,	)	CA No. 92-15619
	)	
v.	)	DC No.
	)	CV-91-01840-SAW
MAURICE DANCE;	)	
JAY TONTZ, et al.,	)	
	)	**MEMORANDUM**
Defendants-Appellees,	)	
	)	

Appeal from the United States District Court
for the Northern District of California
Stanley A. Weigel, District Judge, Presiding

Argued and Submitted October 5, 1993
San Francisco, California

BEFORE: BOOCHEVER, THOMPSON, and O'SCANNLAIN, Circuit Judges.

Professor S. David Aviel sued five administrators ("appellees") at California State University at Hayward ("CSUH") for violating his civil rights under 42 U.S.C. § 1983 and for several pendent state law claims. Aviel claims that appellees took the following actions in retaliation for a lawsuit he filed against CSUH in February 1989: (1) in Summer 1990, appellees unilaterally docked Aviel's pay $8,800 without notice; (2) in Summer 1990, appellees attempted to demote Aviel, thereby reducing his salary $16,000 annually; (3) in Summer 1990, appellees tried to discipline Aviel for a purchasing procedures irregularity involving $29, which the University later determined was petty; and (4) in February 1991, a Board of CSUH administrators denied Aviel a research grant.

The district court granted summary judgment for appellees on the section 1983 claims and dismissed the pendent state claims on Eleventh Amendment grounds. Aviel timely appealed.

I

To recover under 42 U.S.C. § 1983 for retaliation against the exercise of protected speech, a plaintiff must show that his or her speech was a "substantial" or "motivating" factor of the defendant's allegedly retaliatory

conduct. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). Thus, to survive summary judgment, Aviel must raise a genuine issue of appellees' improper motive.

Aviel contends that he has tendered sufficient circumstantial evidence to raise a genuine issue of material fact whether the 1989 lawsuit was the motivating factor for the disciplinary actions. First, appellees in the current case were colleagues of the defendants in 1989 lawsuit and one current appellee was a witness for the 1989 defendants. Second, a former chairperson of the department testified that Aviel's 1989 lawsuit "doesn't sit well with a lot of people."

Appellees point to evidence that there was no retaliation related to the February 1989 lawsuit. First, Aviel received an earlier research grant in May of 1989, three months after he filed the lawsuit. If appellees were truly angered by appellant's lawsuit, they argue, it is more likely that they would have denied this earlier research grant, rather than the grant almost two years later. Second, appellees claim that they took disciplinary action against Aviel because of his abrupt departure for Israel in the middle of the Spring 1990 semester. Appellees assert that the students were confused and upset by the change in professors mid-semester and that Aviel did not have proper approval for his trip.

Aviel cites six cases holding that summary judgment is usually inappropriate in section 1983 cases when a plaintiff claims that he or she was punished in retaliation for protected speech and motive is at issue. In three of the cases Aviel cites, the plaintiff presented direct evidence of the defendants' improper motive. Mt. Healthy

City, 429 U.S. at 283 n. 1; Burgess v. Pierce County, 918 F.2d 104, 106, n.4 (9th Cir. 1990); Peacock v. Duval, 694 F.2d 644, 657 (9th Cir. 1982). Appellant has offered no direct evidence in this case, so these cases are inapposite.

In the three remaining cases, the plaintiff presented strong circumstantial evidence of the defendants' improper motive. For example, in Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310 (9th Cir 1989), the plaintiff "described a telephone conversation between himself and [the defendant] in which [the defendant] allegedly intimated that he would 'somehow get even' with" the plaintiff for his protected speech. Id., at 1315. In Schwartzman v. Valenzuela, 846 F.2d 1209 (9th Cir. 1988), the plaintiff produced a memorandum from the defendants "warning him that he was not authorized to speak out on certain employee matters that were then in dispute at the hospital." Id. at 1212. In Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987), one defendant had "allegedly issued to [the plaintiff] a threat meant to keep the [plaintiff] from airing any of his opinions publicly." Id. at 428. Another defendant had "allegedly told [the plaintiff] to cancel a scheduled media interview and prohibited him from granting any further interviews." Id. at 429. In all three cases, there was strong circumstantial evidence that the defendants wanted to prevent or were angered by the plaintiff's speech and punished him because he did not relent.

In the case before us, there is no link between the protected speech and appellees. Aviel's strongest piece of circumstantial evidence is a statement by a former department chairperson that the 1989 lawsuit "somehow doesn't sit well with a lot of people." However, this

provides no link to these five appellees. No current appellee was a defendant in the prior lawsuit. While Aviel alleges that these appellees knew about the 1989 lawsuit, he has advanced no evidence that these five appellees even had an opinion on the issue, let alone cared enough to retaliate against appellant through disciplinary procedures. Furthermore, all of appellees' conduct took place at least a full year after the 1989 lawsuit. Aviel's specific allegations merely prove that appellees probably do not like him, but none of these allegations link appellees' conduct to the 1989 lawsuit. Furthermore, appellees have undertaken actions since the 1989 lawsuit which suggest that they bear no animus because of the lawsuit. For example, although Aviel was denied a research grant in 1991, he was awarded a similar grant in May 1989 after the lawsuit was filed.

In sum, Aviel's speculations of improper motive do not rise to the level of "strong circumstantial evidence" necessary to survive grant of summary judgment to appellees.

II

Aviel appeals the district court's dismissal of his pendent state law claims. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), established that for Eleventh Amendment purposes state officials may not be sued in federal court for violations of state law. This bar cannot be circumvented by naming defendants in their individual capacity if "the state is the real, substantial party in interest." Id. at 101 (citations omitted). Pennhurst held that "the general criterion for determining

when a suit is in fact against the sovereign is the effect of the relief sought." Id. at 107 (emphasis in original).

Appellees argue that the state is the real party in interest under Cal. Govt. Code § 825, which provides for indemnification of damage awards against state officials for acts committed while performing official duties. The district court was persuaded that because the state would ultimately pay any resulting damages, it was the real party in interest and Eleventh Amendment immunity applied.

California's indemnification program does not expand Eleventh Amendment immunity to cover state officials sued in their individual capacities. In Ronwin v. Shapiro, 657 F.2d 1071 (9th Cir. 1981), we held that a state indemnification plan did not immunize individual state officials from state law claims in a federal court because "a state should not be able to turn a purely intramural arrangement with its officers into an extension of sovereign immunity." Id. at 1074 (quoting Laurence H. Tribe, American Constitutional Law 132-33 n.22 (1978)). Furthermore, in Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984), cert. denied, 469 U.S 1127 (1985), this circuit specifically held that Cal. Govt. Code § 825 does not immunize officials in federal section 1983 actions. Id. at 1146-49. The district court nevertheless reasoned that Demery was inapplicable because it involved a federal claim, not a state claim as at issue here. We disagree. Although Demery involved a federal claim, the principle is the same. The logic of Ronwin and Demery survive Pennhurst. Section 825 does not establish Eleventh Amendment immunity.

We remand the state claims to the district court for further proceedings. However, because the federal

cause of action has been adjudicated, the district court has discretion to dismiss state claims for lack of jurisdiction. 28 U.S.C. § 1367(c); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966). In making its decision, the district court should consider whether appellant would be precluded from bringing suit in state court due to application of the statute of limitations.

AFFIRMED in part, **REVERSED and REMANDED** in part; each party to bear its own costs.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

S. DAVID AVIEL,	)	**[Filed March 4, 1992]**
	)	
Plaintiff,	)	DC No.
	)	C-91-1840 SAW-ENE
vs.	)	
	)	**MEMORANDUM AND**
MAURICE DANCE,	)	**ORDER**
JAY TONTZ,	)	
WADE MOREHOUSE,	)	
BRUCE MACNAB,	)	
RICHARD ZOCK,	)	
	)	
Defendant.	)	
	)	

Plaintiff is a professor in the School of Business at California State University at Hayward ("CSUH"). Defendants are five of plaintiff's former supervisors or administrators at the University. Plaintiff sues these individuals for violation of his civil rights under 42 U.S.C.

§ 1983 and eight pendent state law claims.[1/] The suit arises from a series of disciplinary and other actions against plaintiff allegedly taken in retaliation for a state court lawsuit he filed against the University in 1989. On October 31, 1991, this Court dismissed the state law claims against defendants in their official capacities but maintained jurisdiction over the claims against them in their individual capacities. Defendants now renew their motion to dismiss the state law claims under the Eleventh Amendment. They also move for judgment on the pleadings or summary judgment on plaintiff's § 1983 claim. Plaintiff seeks an order protecting a witness from possible retaliation from the University for her testimony. He also seeks sanctions against defendants' attorney for conduct that allegedly intimidated that witness during her deposition and has now made her reluctant to testify.

Facts

In February 1989, plaintiff filed a lawsuit in state court against certain University administrators. In that suit he alleged, inter alia, that the named administrators negligently investigated unsubstantiated charges of sexual

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1. These claims are for defamation, interference with contractual relations, interference with prospective economic advantage, invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff dismissed initial claims for breach of contract and breach of the covenant of good faith and fair dealing. He also dismissed the State of California, which was originally named as a defendant.

harassment made against him in 1987, and defamed him by leaking those charges to the campus populace. Plaintiff also included a breach of contract claim for the University's failure to comply with its promise to destroy the file containing unsubstantiated charges of harassment made against him in 1981. The Alameda County Superior Court allegedly rendered a judgment in plaintiff's favor on June 6, 1991.[2/]

The record before the Court establishes that, since 1990, plaintiff has been the subject of a substantial amount of disciplinary action and other unfavorable treatment by the University. That action and treatment include the following:

1. In the summer of 1990, University administrators decided to demote plaintiff for taking unauthorized leave of absence in the middle of the preceding spring semester. The demotion was eventually denied by a neutral arbitrator.

2. That same summer, the University docked some $8900 of plaintiff's salary because of his spring absence. That action is now the subject of a separate contract grievance filed by plaintiff against the University.

3. Also in the summer of 1990, the University tried to discipline plaintiff for "intervening in the School's purchasing procedures" after plaintiff changed the specifications of a computer part that plaintiff himself had requisitioned for his department with University approval.

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2. No evidence of this judgment appears in the record.

After investigation and administrative review, this accusation was dropped as baseless and petty.

4. In February 1991, a Board composed of University administrators denied plaintiff a research grant. The denial was apparently based not on the merits of the proposal but on the ground that plaintiff had "violated University rules" and might misuse the funds. In April of that year, in an apparent effort to justify the denial of plaintiff's grant, the Board added criteria of "scholarly behavior" and "academic citizenship" for the awarding of grants.[3/]

Each of the named defendants was involved in at least one of the above actions. Plaintiff claims that all of the actions were taken in retaliation for his state lawsuit against the University and that defendants have therefore violated his First Amendment right of access to the courts. In the motions now before the Court, plaintiff seeks an order protecting a witness from possible retaliation from the University for her testimony. He also seeks sanctions against defendants' attorney for conduct that allegedly intimidated that witness during her deposition and has now made her reluctant to testify. Defendants move for judgment on the pleadings or summary judgment on plaintiff's § 1983, on the ground that plaintiff has presented insufficient evidence of improper motive to

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3. Plaintiff also claims that his September 1991 salary was withheld without explanation, and that the fall course he has taught for many years was assigned to new and part-time faculty. The record reveals no evidence in support of these allegations besides plaintiff's declaration.

overcome defendants' qualified immunity as state officials. Defendants also renew their motion to dismiss plaintiff's pendent state claims as barred by the Eleventh Amendment.

Discussion

A. § 1983 claim.

To survive defendants' motion for judgment on the pleadings, plaintiff's complaint must state "nonconclusory allegations setting forth evidence of unlawful intent." Branch v. Tunnell, 937 F.2d 1382, 1386 (9th Cir. 1991). The alleged evidence may be direct or circumstantial. Id. The factual allegations must be "specific and concrete enough" to enable defendants to prepare a response. Id. Plaintiff's complaint is replete with specific factual allegations of improper conduct by defendants. Although there is no allegation of direct evidence other than plaintiff's belief that defendants' actions were taken in retaliation for his lawsuit, the alleged circumstantial evidence is specific and concrete enough to deny defendants' motion to dismiss.

The evidence is not, however, sufficient to survive defendants' motion for summary judgment. Some direct evidence of unconstitutional intent is required to defeat a motion for summary judgment on qualified immunity grounds. See, e.g., Burgess v. Pierce County, 918 F.2d 104, 106 (9th Cir 1990); Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1315-16 (9th Cir. 1989). Plaintiff has presented no such evidence. Substantial evidence points to plaintiff's mid-semester absence as the primary

motivation for defendants' attempt to demote plaintiff and dock his pay. To be sure, the record suggests that at least some of the defendants may have developed a dislike or distrust of plaintiff over the years. But even if some prejudice or improper motive underlay defendants' actions, plaintiff has presented no evidence that retaliation for his lawsuit -- the sole basis of plaintiff's § 1983 claim -- was that motive.

Plaintiff points to testimony by two individuals as evidence of retaliation. First, a colleague of plaintiff stated that plaintiff is "not particularly popular" with others in the department, and that one of several reasons for his unpopularity may be his earlier lawsuit, which "somehow doesn't sit well with a lot of people." Kilgour Dep. at 76-78. Second, defendant Tontz, the deal of the business school, stated that in wanting to discipline plaintiff "to the fullest extent possible" for the unauthorized absence, he took into account plaintiff's "full record" but never investigated plaintiff's disciplinary or attendance record prior to the period of his absence. Tontz Dep. at 111-12.

None of this approaches the evidence of retaliation found sufficient to withstand summary judgment in Burgess or Sorannos' Gasco. In Burgess, a county fire marshal claimed he had been fired for speaking out against proposed ordinances he considered unsafe. The court denied summary judgment since the defendants had specifically ordered the plaintiff not to speak out further and told him his job would be jeopardized if he continued to do so. 918 F.2d at 106 n.4. In Soranno's Gasco, a petroleum products company claimed its plant permits were denied because of its vocal opposition to certain

regulations. In denying summary judgment, the court noted that one defendant had told the plaintiff he would "somehow get even" with it for generating unfavorable publicity, and the timing and nature of the allegedly retaliatory acts were suspicious. 874 F.2d at 1315-16.

Here there are no inculpatory statements by any defendant and the time and nature of the actions do not raise suspicions of retaliation. All of the actions of which plaintiff complains began during and after his spring 1990 absence, a full year after the state court lawsuit was filed. None of the defendants named herein were parties to that suit. Plaintiff's research grant proposal was denied in February 1991, but an earlier grant proposal of his was approved in May 1989, three months after his lawsuit was filed. The most that can be said is that defendants may have exploited plaintiff's absence to act on personal differences with him. No "significantly probative" evidence suggests that his lawsuit was a "substantial" or "motivating" factor in their actions. Mt Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1976); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1985). Summary judgment for defendants is therefore appropriate. Plaintiff may well have strong claims for defamation or malicious prosecution, but these are state law torts that cannot sustain his § 1983 claim.

B. State Claims.

Defendants contend that the Eleventh Amendment bars this Court from exercising jurisdiction over plaintiff's state law claims. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 121 (1984). This Court

previously rejected this argument since nothing in the record indicted that a judgment against defendants in their individual capacities would be paid by the state. See Pennhurst, 465 U.S. at 101 n.11; Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1350 (9th Cir. 1981), aff'd. sub nom Kush v. Rutledge, 460 U.S. 719 (1982). Defendants have now shown that any judgment against them will be paid by the State of California pursuant to California Government Code § 825. A judgment against defendants would thus be a judgment against the State of California under the meaning of Pennhurst. This Court therefore cannot hear plaintiff's state law claims. The holding in Guzman v. Van Demark, 657 F.Supp. 1180, 1184 (C.D. Cal. 1987), does not change this conclusion. In retaining jurisdiction over state law claims in analogous circumstances, that case relied on Ronwin v. Shapiro, 657 F.2d 1971, 1074-7 (9th Cir. 1981), which was decided before Pennhurst, and Demery v. Kupperman, 735 F.2d 1139, 1147-49 (9th Cir. 1984), which did not involve state law claims.

C. Plaintiff's motion for protective order and sanctions.

Plaintiff seeks an order forbidding the University and any of the individual defendants from retaliating against a certain witness because of her testimony against them. That witness is an employee of the University who took notes at the Board meeting at which plaintiff's 1991 research grant was denied. During the deposition of this witness, defendants' counsel repeatedly instructed her not to answer questions about comments made during that

Board meeting by non-defendants, on the ground that these comments were privileged. See, e.g., Snyder Depo. at 45-46, 55. At one point defendants' counsel warned that he did not know "what effect [it] might have on her career" if she answered such questions. Id. at 46. The witness subsequently stated that she felt threatened and intimidated by defendants' counsel's comments. See, e.g., id. at 50-51, 68, 71. Plaintiff states that as a result of this deposition, the witness is now unwilling to testify at trial.[4/] In addition to a protective order, plaintiff seeks sanctions against defendants' counsel for his conduct during the deposition.

This Court has the power to sanction attorneys for "bad faith" or "abusive" litigation practices. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-66 (1980). Although the comments by defendants' counsel may have intimidated the witness, it is not clear that they were intended to do so. Defendants' counsel made efforts to explain his instructions carefully. See, e.g., Snyder Depo. at 55-57. When the witness expressed concerns, he suggested a recess and urged her to seek independent counsel. Id. at 68-69. A review of the entire transcript of the deposition does not suggest that defendants' counsel was acting in bad faith. Sanctions against him would therefore be inappropriate. A protective order is also unnecessary in light of the Court's disposition of defendants' motions.

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4. Defendants correctly object to plaintiff's statements in this regard as hearsay.

Accordingly,

IT IS HEREBY ORDERED that:

(1) Defendants' motion for summary judgment on plaintiff's § 1983 claim is GRANTED;

(2) Defendants' motion to dismiss plaintiff's state law claims is GRANTED;

(3) Plaintiff's motion for a protective order and sanctions is DENIED.

Dated: March 4, 1992.

STANLEY A. WEIGEL
Judge